

REQUEST FOR COMMENTS

The Supreme Court's Rules Committee on Civil Practice and Procedure seeks comments from the bench, the bar, and the public on the Motion to Establish *Pro Bono* Appellate Program and to Implement the Program as Rule 7 of the Mississippi Rules of Appellate Procedure, filed by the Appellate Practice Section of The Mississippi Bar. The motion is attached.

Comments must be filed with the Clerk of Appellate Courts at Post Office Box 249, Jackson, MS 39205. **The filing deadline is May 9, 2016.**

IN THE SUPREME COURT OF MISSISSIPPI**IN RE: THE MISSISSIPPI RULES
OF APPELLATE PROCEDURE****MOTION TO ESTABLISH *PRO BONO* APPELLATE
PROGRAM AND TO IMPLEMENT THE PROGRAM AS RULE 7
OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE**

Pursuant to Rule 27(f) of the Mississippi Rules of Appellate Procedure, the undersigned, on behalf of the Appellate Practice Section of The Mississippi Bar, recommend that the Court adopt a *Pro Bono* Appellate Program as set forth in the proposed rule attached as Exhibit A. In support, the movants would show the Court the following:

1.

The Mississippi Supreme Court and the Mississippi Court of Appeals regularly decide cases advanced by *pro se* litigants. These cases can present issues of first impression or complicated legal questions. *Pro se* litigants often do not have the training or skills to adequately address intricate questions of law.

2.

Appellate courts throughout the nation have experienced significant increases in the number of unrepresented parties.¹ While the proliferation of *pro se* parties poses serious challenges to the country's appellate courts, this phenomenon

¹ See Ex. B, Report on *Pro Bono* Appellate Programs by *Pro Se-Pro Bono* Committee, Council of Appellate Lawyers, American Bar Association at p. 1.

simultaneously presents excellent opportunities for appellate attorneys to fulfill their professional responsibility to render *pro bono* services pursuant to Mississippi Rule of Professional Conduct 6.1; enhance professional development; and provide meaningful assistance to appellate courts.² *Pro bono* service by appellate attorneys will also honor the constitutional guarantee of access to the judicial system, as “[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.” Miss. Const. of 1890, art. 3, § 24.

3.

The Appellate Practice Section has researched and reviewed *pro bono* appellate programs offered in other jurisdictions. The types and scope of *pro bono* appellate programs vary greatly from jurisdiction to jurisdiction. Regardless, one thing is clear: there is a movement throughout the country for *pro bono* appellate programs to assist the appellate courts. For example, the Appellate Practice Section has identified seventeen states with *pro bono* appellate programs.³ Furthermore, a

² *Id.*

³ *E.g., id.* at pp. 13-14 (providing a brief overview of *pro bono* appellate programs in New Hampshire and New Mexico).

See Ex. C, Manual on *Pro Bono* Appeals Programs for State Court Appeals, Council of Appellate Lawyers of the American Bar Association (Oct. 5, 2013) (providing a comprehensive overview of *pro bono* appellate programs in California, Colorado, Florida, Hawaii, Indiana, Minnesota, Montana, New York, North Carolina, Oregon, Tennessee, Texas, Virginia, Wisconsin).

See Ex. D, Arizona Court of Appeals *Pro Bono* Representation Program Manual (overview of Arizona’s *pro bono* appellate program).

number of Federal Circuit Courts of Appeals have established *pro bono* appellate programs.⁴

4.

After performing the necessary research into the nature of other programs, many appellate attorneys in Mississippi have worked over the course of the last two years to create the structure for an appropriate *pro bono* program for Mississippi. The intention was to create a *pro bono* appellate program that would be sustainable, beneficial to *pro se* litigants, useful to Mississippi's appellate courts, and valuable to Mississippi's appellate attorneys. After discussion and the opportunity for review by members of the Appellate Practice Section of The Mississippi Bar as well as by the Mississippi Volunteer Lawyers Project and Mississippi Access to Justice Commission, a consensus was reached. The proposal for the *Pro Bono* Appellate Program is set forth in the proposed rule attached as Exhibit A.

5.

The proposed rule is not based on a particular *pro bono* appellate program from a specific state. The vast majority of *pro bono* appellate programs focus on civil appeals. However, the various programs differ greatly in scope, administrative responsibility, and the point in time when *pro bono* appellate counsel begins to participate in the appeal. The rule proposed by the Appellate Practice Section is narrowly-tailored to match the needs of Mississippi's appellate courts and the needs

⁴ See, e.g., Ex. E (overview of the Ninth Circuit Court of Appeals' *pro bono* appellate program) and Ex. F (overview of the Second Circuit Court of Appeals' *pro bono* appellate program).

of *pro se* litigants with the number and availability of Mississippi's appellate attorneys. Arizona and Montana, however, have current *pro bono* appellate programs that are very similar to the proposed Mississippi program.⁵ Indeed, as with the rule proposed here, both Arizona and Montana use a model that allows the respective appellate court to request supplemental briefing or oral argument from *pro bono* appellate counsel after the case has been fully briefed by the litigants.

6.

The proposed Mississippi program is designed to be limited to civil appeals. This limitation is a result of the guaranteed right to counsel for criminal defendants and acknowledges the relatively small number of appellate attorneys available to adequately assist with criminal appeals or post-conviction relief motions.⁶ The proposed Mississippi program provides for *pro bono* appellate counsel to serve as *amicus curiae* to assist the Court with legal issues presented in a case involving a *pro se* party. It proposes that appointment of *pro bono* appellate counsel will take place after the case is fully briefed, based on the Court's determination that additional

⁵ See Ex. D (overview of Arizona's *pro bono* appellate program).

See Ex. G (overview of Montana's *pro bono* appellate program taken from an excerpt of the Manual on *Pro Bono* Appeals Programs for State Court Appeals, Council of Appellate Attorneys of the American Bar Association (Oct. 5, 2013)).

⁶ Granted, there may be the occasional unique circumstance where the Mississippi Supreme Court or Mississippi Court of Appeals seeks to appoint *pro bono* appellate counsel for a post-conviction relief proceeding. For example, the Mississippi Supreme Court recently issued an order requesting the Appellate Practice Section to designate attorneys to serve as *pro bono amicus curiae* in a Post-Conviction Relief proceeding. *Bester v. State*, No. 2013-CT-00058-SCT (Order entered Aug. 4, 2015). For these rare circumstances, the Appellate Practice Section requests that the Mississippi Supreme Court follow the same procedure set forth in the proposed Rule.

briefing would be helpful. The proposed Mississippi program also contemplates using the Mississippi Volunteer Lawyers' Project as the administrator for purposes of identifying and selecting appropriate *pro bono* appellate counsel after the Mississippi Supreme Court or Mississippi Court of Appeals enters an order requesting a supplemental brief from *pro bono* appellate counsel.

7.

The Appellate Practice Section proposes that the Rule be incorporated into the Mississippi Rules of Appellate Procedure as Rule 7, immediately following Rule 6 (Counsel on Appeal in Criminal Cases and Proceedings *In Forma Pauperis* in Criminal Cases). Rule 7 formerly governed Security for Costs on Appeal in Civil Cases, but that rule was omitted from the current rules because costs on appeal are now covered by Rule 11.

WHEREFORE, the undersigned, on behalf of the Appellate Practice Section of The Mississippi Bar, respectfully request the Court to consider the proposed Rule to establish a *Pro Bono* Appellate Program and to implement the *Pro Bono* Appellate Program as Rule 7 of the Mississippi Rules of Appellate Procedure.

Respectfully submitted, this the 18th day of December, 2015.

Appellate Practice Section
of The Mississippi Bar

/s/ Margaret Oertling Cupples
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